

1998

# Constitutional Law—Unreasonable Ambiguity: Minnesota'S Amended Stalking Statute is Unconstitutionally Vague

Brian L. McMahon

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

McMahon, Brian L. (1998) "Constitutional Law—Unreasonable Ambiguity: Minnesota'S Amended Stalking Statute is Unconstitutionally Vague," *William Mitchell Law Review*: Vol. 24: Iss. 1, Article 5.  
Available at: <http://open.mitchellhamline.edu/wmlr/vol24/iss1/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

**CONSTITUTIONAL LAW—UNREASONABLE  
 AMBIGUITY: MINNESOTA’S AMENDED STALKING  
 STATUTE IS UNCONSTITUTIONALLY VAGUE**

I. INTRODUCTION .....189

II. HISTORY OF STALKING LAW .....190

A. *History and Development of Stalking Law in the United States* .....190

B. *Minnesota’s Stalking Law* .....193

III. THE VAGUENESS DOCTRINE.....196

A. *The Elements of Vagueness*.....196

B. *Applications of the Vagueness Doctrine*.....197

IV. VAGUENESS AND MINNESOTA’S STALKING STATUTE .....198

A. *The Intent Element in Stalking Statutes: Is General Intent Unconstitutional?* .....199

1. *Specific Intent Statutes Held Unconstitutional*.....199

2. *Minnesota’s Narrowly Drawn Act Requirement* .....201

3. *General Intent Statutes Held Constitutional*.....202

B. *Displacing the Objective Standard*.....205

1. *The Subjective Standard is Unconstitutional*.....205

2. *The Standard “Know or Have Reason to Know” is Ambiguous* .....210

V. CONCLUSION.....212

I. INTRODUCTION

The Minnesota Legislature amended the state’s stalking statute last May,<sup>1</sup> establishing stalking as a general intent crime in Minnesota.<sup>2</sup> The legislature also removed the objective “reasonable person” standard from the definition of the crime that gauged stalking activity’s impact on a victim.<sup>3</sup> The amended statute requires that a stalker know his or her conduct would cause a victim to feel intimidated or oppressed.<sup>4</sup>

This Comment will illustrate that Minnesota’s amended stalking stat-

---

1. See Act of May 6, 1997, ch. 96, §§ 6-9, 1997 Minn. Laws 700 (amending Minn. Stat. § 609.749 (1996)).

2. See *infra* note 35 and accompanying text.

3. See *infra* note 36 and accompanying text.

4. See *infra* note 36 and accompanying text.

ute is unconstitutionally vague. In doing so, it will briefly document the development of stalking law in the United States generally<sup>5</sup> and in Minnesota specifically.<sup>6</sup> It will then demonstrate that the amendment establishing stalking as a general intent crime does not render the statute unconstitutional and is the standard necessary to ensure all stalking activity is brought within its scope.<sup>7</sup> However, the legislature's removal of the reasonable person standard, read in light of other jurisdictions' rulings on stalking statutes, renders the statute unconstitutionally vague.<sup>8</sup> In addition, its subjective element in the definition of the crime may, *de facto*, negate the provision establishing stalking as a general intent crime by introducing language denoting specific intent as an element of this crime, rendering the statute ambiguous.<sup>9</sup>

## II. HISTORY OF STALKING LAW

### A. History and Development of Stalking Law in the United States

California passed the nation's first stalking legislation in 1990.<sup>10</sup> Since then, all fifty states and the District of Columbia have enacted stalking statutes.<sup>11</sup> While there is no widely accepted definition of stalking,<sup>12</sup>

5. See *infra* notes 10-24 and accompanying text.

6. See *infra* notes 25-36 and accompanying text.

7. See *infra* notes 58-95 and accompanying text.

8. See *infra* notes 101-28 and accompanying text.

9. See *infra* notes 129-34 and accompanying text.

10. See CAL. PENAL CODE § 646.9 (Supp. 1998). The statute defined stalking as repeatedly, willfully, and maliciously following or harassing another person. *Id.*

11. ALA. CODE §§ 13-A-6-90 (1992); ALASKA STAT. § 11.41.260,.270 (Michie 1996), ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1997); ARK. CODE ANN. § 5-71-229 (1993); CAL. PENAL CODE § 646.9 (West Supp. 1998); COLO. REV. STAT. § 18-9-111 (1992); CONN. GEN. STAT. §§ 53a-181c-182d (1994); D.C. STAT. § 22.504 (1996); DEL. CODE ANN. tit. 11.1312A (1995); FLA. STAT. ch. 784.048 (Supp. 1998); GA. CODE ANN. § 16-5-90-92 (1996); HAW. REV. STAT. 711-1106.5 (1994); IDAHO CODE § 18-7905 (1997); ILL. REV. STAT. 5/12-7.3, .4 (1997); IND. CODE ANN. § 35-45-10-5 (West 1997); IOWA CODE § 708.11 (1993); KAN. STAT. ANN. 21-3438 (1995); KY. REV. STAT. ANN. 508.130, .140, .150 (Michie 1996); LA. STAT. ANN. 14:40.2 (West 1997); ME. REV. STAT. ANN. 17-A § 210-A (West Supp. 1997); MD. CODE ANN. § 121B (1996); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1997); MICH. COMP. LAWS ANN. §§ 750.411h-411i (1997); MINN. STAT. § 609.749 (Supp. 1997); MISS. CODE ANN. 97-3-107 (1972); MO. ANN. STAT. § 565.255 (West Supp. 1996); MONT. CODE ANN. § 45-5-220 (1997); NEB. REV. STAT. ANN. § 28-311.02-05 (Michie 1996); NEV. REV. STAT. § 200.575 (1991); N.H. REV. STAT. ANN. § 633:3-a (1996); N.J. STAT. ANN. 2C: 12-10 (West 1996); N.M. STAT. ANN. § 30-3A-1 to -4 (1994); N.Y. PENAL LAW § 240.25-.26 (McKinney Supp. 1997); N.C. GEN. STAT. § 14-277.3 (1993); N.D. CENT. CODE 12.1-17-07.1 (1997); OHIO REV. CODE ANN. § 2903.211 (1996); OKLA. STAT. tit 21 § 1173 (West Supp. 1997); OR. REV. STAT. § 163.732 (1996); PA. STAT. ANN. § 2709 (1984); R.I. GEN. LAWS § 11-59-1 to -3 (1994); S.C. CODE ANN. § 16-3-1700 (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS § 22-19A-1

the term brings to mind a wide range of harassing behaviors that frighten or terrorize a victim.<sup>13</sup>

The response by legislatures in enacting stalking statutes has been attributed to two factors. The first is recognition that stalking is a widespread, serious problem in the United States. It is documented that 200,000 people in the United States stalk someone each year.<sup>14</sup> Stalking activity is not limited to former spouses or partners, having extended to incidents where the stalker has had little or no previous contact with his or her victim.<sup>15</sup> The impact on stalking victims is substantial, and many are forced to alter their lives drastically.<sup>16</sup> Second, since stalking behavior is manifested by pursuit or harassment of the victim, rather than by actual attack, stalking victims had to wait and hope their stalker would not actu-

(Michie 1997); TENN. CODE ANN. § 39-17-315 (1997); TEX. PENAL CODE ANN. § 42.07 (West 1994); UTAH CODE ANN. § 76-5-106.5 (1995); VT. STAT. ANN. tit. 13 § 1061-1063 (Supp. 1997); VA. CODE ANN. § 18.2-60.3 (Michie 1996); WASH. REV. CODE ANN. § 9A. 46.110 (West 1996); W. VA. CODE § 61-2-9a (1996); WIS. STAT. ANN. § 947.013 (West 1996); WYO. STAT. ANN. § 6-2-506 (Michie 1996).

12. See M. Katherine Boychuk, *Are Stalking Laws Unconstitutionally Vague or Overbroad?* 88 NW. U. L. REV. 769, 774 (1994). Stalking statutes vary greatly in how they define the crime and defy easy classification. See *id.* See also Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 HARV. J. ON LEGIS. 1, 5 (1994) (asserting that there is no precise definition of stalking behavior).

13. See Ellen F. Sohn, *Antistalking Statutes: Do They Really Protect Victims?*, 30 CRIM. L. BULL. 203, 205 (1994). "The stalker follows his or her victim, spies on them, and perhaps makes threats." *Id.* See also Kathleen G. McAnaney et al., Note, *From Impudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 831 (1993). Stalkers make repeated efforts to contact their victims by phone or letter, send gifts, attempt visits, and undertake surveillance. See *id.*

14. See Sohn, *supra* note 13, at 205. Five percent of women in the general population will be victims of stalking in their lives. See *id.* See also Faulkner & Hsiao, *supra* note 12, at 4 (noting that there are an estimated 200,000 stalkers in the United States).

15. See Matthew J. Gilligan, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285, 286 n.9 (1992). Statements in the Congressional Record note the nationwide proliferation of stalking-related domestic violence as well as increased incidents of stalking by complete strangers as major impetuses for establishing stalking statutes. See *id.* (emphasis added.) See also Faulkner & Hsiao, *supra* note 12, at 5. Stalkers can be obsessed fans, divorced or separated spouses, ex-lovers, rejected suitors, neighbors, coworkers, classmates, gang members, former employees, or complete strangers. See *id.*

16. See Beth Bjerregaard, *Stalking and the First Amendment: A Constitutional Analysis of State Stalking Laws*, 32 CRIM. L. BULL. 307, 309 (1996) (detailing that stalking victims are forced to change their phone numbers and even their residences.); see also *People v. White*, 536 N.W.2d 876, 879 (Mich. Ct. App. 1995) (stalking victim moved to her father's home, lost her job because co-workers were "afraid" of her stalker, and changed her phone number, only to have her stalker obtain her new number within one week); *Johnson v. State*, 648 N.E.2d 666, 667 (Ind. Ct. App. 1995) (stalking victim forced to move four times, only to have stalker find her).

ally follow through with threats or go beyond mere pursuit,<sup>17</sup> because police are unable to arrest an individual for a crime not yet committed.<sup>18</sup> Legislatures responded to the concern that the legal system provided no remedy<sup>19</sup> or insufficient remedies for this crime.<sup>20</sup> Stalking legislation fills this void in the legal system, granting victims sufficient remedies to end their fears or prevent their deaths by allowing law enforcement officers to intercede *before violence occurs*.<sup>21</sup> One state court asserted that effective stalking legislation is part of a state's "social contract" with its citizens.<sup>22</sup>

At least twenty-seven jurisdictions' appellate courts have ruled on the constitutionality of their states' stalking statutes against vagueness and/or overbreadth challenges. Twenty-four have been upheld against constitutional attack<sup>23</sup> and three have been invalidated as unconstitutionally

17. See Sohn, *supra* note 13, at 205.

18. See *id.* at 207.

19. See generally Gilligan, *supra* note 15, at 295-99 nn. 66-88 and accompanying text (asserting that assault statutes fail to provide a remedy because a stalker may never commit an overt act sufficient to raise a fear of *immediate* bodily harm as required by assault statutes); see also *id.* at note 79 (citing a Congressional statement by Senator Cohen regarding a stalker who, after stalking girl for 19 months without committing an overt act, suddenly kidnapped, raped and murdered her. Police had taken no action because prior to the kidnapping, the stalker had committed no overt act that constituted a crime).

20. See Karen A. Brooks, *The New Stalking Laws: Are They Adequate to End Violence?*, 14 *HAMLIN J. PUB. L. & POL'Y* 259, 259 (1993). "In the year preceding the passage of the law, five California women were murdered by men they knew. Restraining orders issued to protect these women from their stalkers proved ineffective." *Id.* See also Sohn, *supra* note 13, at 208. Protective orders are ineffective because a victim will still have to wait in fear before police can prosecute a violation of the order. See *id.* Because these orders are specific, a stalker can avoid a violation by altering his or her behavior to avoid the literal language of the order. See *id.* Procedural requirements for obtaining these orders are complex and expensive, discouraging victims from seeking them. See *id.* Further, many victims realize waiving a piece of paper in front of a stalker is of little value and may serve only to aggravate the stalker. See *id.* at 209.

21. See Brooks, *supra* note 20, at 259-60 (emphasis added).

22. See *State v. Culmo*, 642 A.2d 90, 101-02 (Conn. Super. 1993). The Connecticut Superior Court stated that the state's interest in criminalizing stalking is to protect citizens from the consequences of stalking behavior. See *id.* The court went on to state that criminalizing stalking provides law enforcement authorities with a means for intervening in stalking situations early on, *before the behavior can escalate into something more serious, including physical assault*. See *id.* Finally, the court added that providing protection from stalking conduct is at the heart of the state's "social contract" with its citizens, and that the freedom to go about one's daily business is "hollow" if one's piece of mind is being destroyed, or his or her safety endangered by the threatening presence of an unwanted pursuer. See *id.*

23. See *Culbreath v. State*, 667 So. 2d 156, 159-64 (Ala. Ct. App. 1995); *Petersen v. State*, 930 P.2d 414, 424-39 (Alaska Ct. App. 1996); *People v. Heilman*, 30 Cal. Rptr. 2d 421, 427-28 (Cal. Ct. App. 1994); *Culmo*, 642 A.2d at 100; *Snowden v. State*, 677 A.2d 33, 36-37 (Del. 1996); *United States v. Smith*, 685 A.2d 380, 388 (D.C. 1996); *Pallas v. State*, 636 So. 2d 1358, 1361 (Fla. Ct. App. 1994); *Johnson v.*

vague.<sup>24</sup> These decisions will be analyzed in light of Minnesota's statute in Part IV.

### B. Minnesota's Stalking Law

The Minnesota Legislature criminalized stalking in 1993.<sup>25</sup> The statute defined stalking as "engag[ing] in intentional conduct in a manner that would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated."<sup>26</sup> The legislature was motivated in drafting this legislation by violent stalking incidents similar to those that had occurred nationwide.<sup>27</sup> Also reflecting national trends, the legislature acknowledged that existing criminal statutes in Minnesota did not adequately protect stalking victims.<sup>28</sup>

---

State, 449 S.E.2d 94, 96 (Ga. 1994); *People v. Holt* 649 N.E.2d 571, 580 (Ill. App. Ct. 1995); *Johnson v. State*, 648 N.E.2d 666, 670 (Ind. App. 1995); *Monhollen v. Commonwealth*, 947 S.W.2d 61, 63 (Ky. Ct. App. 1997); *People v. White*, 536 N.W.2d 876, 883-84 (Mich. Ct. App. 1995); *State v. Martel*, 902 P.2d 14, 19-20 (Mont. 1995); *State v. Saunders*, 695 A.2d 722, 729 (N.J. Super. Ct. App. Div. 1997); *State v. Benner*, 644 N.E.2d 1130, 1132 (Ohio App. 1994); *State v. Saunders* 886 P.2d 496, 497-98 (Okla. Crim. App. 1994); *State v. Rangel*, 934 P.2d 1128, 1132 (Or. Ct. App. 1997); *Com. v. Schierscher* 668 A.2d 164, 172 (Pa. 1995); *State v. Fonseca* 670 A.2d 1237, 1240 (R.I. 1996); *State v. McGill*, 536 N.W.2d 89, 95-96 (S.D. 1995); *Salt Lake City v. Lopez*, 935 P.2d 1259, 1265 (Utah Ct. App. 1997); *Woolfolk v. Commonwealth*, 447 S.E.2d 530, 535-37 (Va. Ct. App. 1994); *State v. Lee* 917 P.2d 159, 167-68 (Wash. Ct. App. 1996); *Luplow v. State* 897 P.2d 463, 472 (Wyo. 1995).

24. *State v. Bryan*, 910 P.2d 212, 220-21 (Kan. 1996); *Commonwealth v. Kwiatowski*, 637 N.E.2d 854, 857 (Mass. 1994); *Long v. State*, 931 S.W.2d 285, 296-97 (Tex. Crim. App. 1996).

25. Act of May 20, 1993, ch. 326, art. 2, § 22, 1993 Minn. Laws 2010 (codified at MINN. STAT. § 609.749 (1994)). Minnesota's anti-stalking statute defined harass as "engag[ing] in intentional conduct in a manner that . . . would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated . . . and causes this reaction on the part of the victim." *Id.*

26. MINN. STAT. § 609.749, subd. 1 (1994).

27. See Cassandra Ward, *Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior*, 12 LAW & INEQ. J. 613, 633-34 (1994) (detailing incidents, two of which resulted in murder, cited by proponents of Minnesota's anti-stalking legislation as evidence of the state's need for such laws).

28. See generally Ward, *supra* note 27, at 621-31 and accompanying text. Minnesota's Domestic Abuse Act is limited only to those related by blood or marriage. See *id.* A victim also is unprotected after a temporary restraining order expires, and penalties for violating a valid restraining order are minimal. See *id.* Assault statutes are ineffective until a stalker violently attacks or attempts to attack his or her victim. See *id.* Trespass statutes are ineffective for stalking activities that take place away from the victim's home. See *id.* Terroristic threat statutes are ineffective against a stalker who merely says words such as "I love you" or "You belong to me." See *id.* Public nuisance statutes are geared more toward privacy concerns than to the harm stalkers inflict on their victims. See *id.* Harassment statutes do no more than increase the penalties for actions proscribed by trespass, assault,

The Minnesota Supreme Court has not ruled conclusively on whether the stalking statute is vague.<sup>29</sup> In *State v. Orsello*, the Minnesota Supreme court skirted the appellant's vagueness argument by stating that the issue of the case was whether or not the stalking statute defined a crime of general or specific intent.<sup>30</sup> The court held that Minnesota's stalking statute defined a specific rather than general intent crime.<sup>31</sup>

Although not necessary to its holding, the court briefly addressed the constitutionality of the statute, declaring that if it held that the stalking statute required only general intent, it "might be void for vagueness and thus, unconstitutional" for failing to provide sufficient notice to the public of what conduct is prohibited.<sup>32</sup> The court did not resolve this constitutional concern, declaring instead that it merely "buttressed" its decision that the statute required specific intent.<sup>33</sup>

and Terroristic threat statutes. *See id.*

29. *See State v. Orsello*, 554 N.W.2d 70, 77 (Minn. 1996) (stating "[w]hile we do not base our decision on any resolution of this constitutional issue, it does buttress our statutory analysis."). The Minnesota Supreme Court has, however, conclusively ruled that a portion of Minnesota's stalking statute is overbroad. *See State v. Machholz*, No. CX-96-1865, 1998 WL 19751, at \*6 (Minn. 1998). In *Machholz*, the appellant rode his horse through a group of people who had gathered to celebrate National Coming Out Day and shouted "You're giving us AIDS!; You're spreading your filth!; There are no homosexuals in heaven!; and You're corrupting our children!" *Id.* at \*1. Appellant was charged with felony harassment in violation of Minn. Stat. § 609.749, subs. 1(1), 2(7), and 3(1). *See id.* The supreme court ultimately dismissed the charges against Machholz holding that the words used in Minnesota's stalking statute namely, "engag[ing] in any other harassing conduct that interferes with another person or intrudes on the person's privacy or liberty," violate the First Amendment's right to expressive activity and are therefore overbroad. *See id.* at \*4-6. The court was careful to note that it did not reach the appellant's vagueness challenge and that the "decision in *Orsello* was based on its interpretation of the statute, not on any resolution of a vagueness challenge." *Id.* at \*6 n.3. The court further noted that "the defendant in *Orsello* was not charged under subdivision 2(7), the particular subdivision at issue [in *Machholz*]." *Id.*

30. *See Orsello*, 554 N.W.2d at 72.

31. *See id.* at 76. Despite the court's express recognition that the statute contained none of the statutorily specified language used to create a specific intent crime in Minnesota, it determined that the intent level required by the statute was "ambiguous." *See id.* at 74. The court therefore embarked on a search for legislative intent mentioning, in dicta, the rule of lenity which requires that ambiguous criminal statutes must be resolved in favor of the defendant; in *Orsello*, lenity required specific intent. *See id.*

32. *See id.* at 76-77 (citing cases from two other jurisdictions where courts have upheld stalking statutes where specific intent is an element of the crime).

33. *See id.* at 77. The supreme court did not raise the issue of overbreadth in *Orsello*, so the topic is beyond the scope of this paper. However, it does merit brief attention because the two doctrines are generally addressed together, particularly when stalking statutes are challenged. The overbreadth doctrine serves to invalidate legislation so sweeping that it restricts constitutionally-protected rights of free speech, press, or assembly. *See Coates v. Cincinnati*, 402 U.S. 611,

In response to the court's ruling, and at the court's invitation,<sup>34</sup> the Minnesota Legislature enacted a "clarifying" amendment that the statute requires only general intent.<sup>35</sup> It also amended the definition of the crime, displacing the objective reasonable person standard with a more subjective standard requiring that a stalker know his or her conduct in-

---

616 (1971). The United States Supreme Court in *Broadrick v. State*, 413 U.S. 601, 613 (1973), set limitations on the invocation of the overbreadth doctrine where conduct and not merely speech is involved, declaring that this doctrine is "strong medicine," to be employed "with hesitation," and "only as a last resort." Where conduct is regulated, a statute which has constitutional applications may be facially invalidated only if its overbreadth is "substantial judged in relation to the statute's plainly legitimate sweep." *Id.* at 615 (emphasis added). These factors are prominent in decisions upholding stalking statutes against overbreadth challenges. See *State v. Martel*, 902 P.2d 14, 20 (Mont. 1995) (holding that it is conduct, and not merely speech, which is proscribed by the statute; statute serves a plainly legitimate purpose); *State v. Culmo*, 642 A.2d 90, 101-04 (Conn. Super. 1993) (holding that state's interest in criminalizing stalking was compelling; statute regulates conduct); *Pallas v. State*, 636 So. 2d 1358, 1364 (Fla. Ct. App. 1994) (ruling that the word "follows" in stalking statute was directed primarily at conduct, not First Amendment expression); *State v. Bilder*, 651 N.E.2d 502, 509 (Ohio App. 9 Dist. 1994) (finding statute was aimed at prohibiting harmful conduct; reflects legitimate state interest).

Subdivision 7 of Minnesota's stalking statute is another factor which mitigates against a constitutional overbreadth attack. Subdivision 7 provides:

Conduct is not a crime under this section if it is performed under terms of a valid license, to ensure compliance with a court order, or to carry out a specific lawful commercial purpose or employment duty, is authorized or required by a valid contract, or is authorized, required, or protected by state or federal law or the state or federal constitutions. Subdivision 2, clause (2) does not impair the right of any individual or group to engage in speech protected by the federal constitution, or federal or state law, including peaceful and lawful handbilling and picketing.

MINN. STAT. § 609.749 subd. 7 (1996).

Courts upholding stalking statutes against overbreadth challenges have determined similar provisions to mitigate against a statute's propensity to infringe on constitutionally protected behavior. See, e.g., *Holt*, 649 N.E.2d at 581 (recognizing that Illinois' statute specifically exempts conduct protected by the first amendment such as lawful picketing or any exercise of free speech or assembly that is otherwise lawful); *Culbreath v. State*, 667 So. 2d 156, 161 (Ala. Ct. App. 1995) (noting that statute specifically declares that "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct'"). The court in *State v. Machholz* mentioned MINN. STAT. § 609.749 subd. 7 without applying it to the facts of the case. See 1998 WL 19751, at \* 2; see also *supra* note 29.

34. See *Orsello*, 554 N.W.2d at 77. The court posited that if the legislature truly meant for stalking to be a general intent crime, it possessed the means "to ameliorate the statute's present lack of precision by a clarifying amendment." *Id.*

35. See Act of May 6, 1997, ch. 96, §§ 6-9, 1997 Minn. Laws 700 (amending Minn. Stat. § 609.749 (1996)). In a prosecution under this section, the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated. See *id.*



timidates or oppresses a victim.<sup>36</sup>

### III. THE VAGUENESS DOCTRINE

#### A. *The Elements of Vagueness*

The vagueness doctrine garners its force from the due process clauses of the Fifth and Fourteenth Amendments, which focus on notice and enforcement.<sup>37</sup> For notice, the doctrine requires that statutes give to a person of ordinary intelligence a reasonable opportunity to know what is prohibited so they may act accordingly.<sup>38</sup> If a statute does not clearly define the conduct prohibited, it is unconstitutionally vague.<sup>39</sup> For enforcement, the vagueness doctrine requires that laws provide explicit standards for those who apply them to prevent arbitrary and discriminatory enforcement.<sup>40</sup> The United States Supreme Court declared that the more important aspect of the vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement officials.<sup>41</sup>

A third, related aspect of the vagueness doctrine ensures that a statute does not infringe upon basic First Amendment freedoms.<sup>42</sup> This aspect of the vagueness doctrine is based on the concern that "[u]ncertain meanings lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."<sup>43</sup>

---

36. See *id.* The new statute defines stalking as engaging in "intentional conduct which: (1) *the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated.*" *Id.* at subd. 1(1) (emphasis added). Compare MINN. STAT. § 609.749(1) (1996). Harass means to engage in intentional conduct in a manner that: (1) *would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated* (emphasis added). *Id.*

37. See U.S. CONST. amend. V, XIV.

38. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); see also *State v. Miner*, 556 N.W.2d 578, 584 (Minn. Ct. App. 1996) (citing *Grayned*).

39. See *Grayned*, 408 U.S. at 108.

40. See *id.*; see also *Kolender v. Lawson*, 461 U.S. 352, 358 (1982). Where a legislature fails to provide minimal guidelines for enforcement, a criminal statute may permit "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

41. See *Kolender*, 461 U.S. at 358; see also *State v. Machholz*, 561 N.W.2d 198, 200 (Minn. Ct. App. 1997), reversed on other grounds, No. CX-96-1865, 1998 WL 19751 (Minn. Jan. 22, 1998) (citing *Kolender*, recognizing that the more important aspect of the void-for-vagueness doctrine was the requirement of guidelines to prevent arbitrary enforcement.)

42. See *Grayned*, 408 U.S. at 109.

43. *Id.*

## B. *Applications of the Vagueness Doctrine*

The threshold matter in applying the vagueness doctrine is whether the statute inhibits First Amendment freedoms.<sup>44</sup> If a statute threatens to inhibit constitutionally protected rights, a more stringent vagueness test is applied.<sup>45</sup> If a statute contains limiting elements that remove First Amendment concerns from consideration, a statute can be evaluated under less exacting due process standards.<sup>46</sup>

Courts examining statutes under attack for vagueness recognize two factors legislatures face in drafting criminal statutes. The first factor is the inherent constraints language imposes on legislatures when defining crimes. Courts do not require meticulous specificity or expect mathematical certainty from language.<sup>47</sup> The second factor concerns the balancing process a legislature undertakes when drafting criminal statutes. This process weighs effectiveness against constitutional infirmity. If the statute is too narrowly drawn, "the risk is nullification by easy evasion of the legislative purpose. . . . If the statute is drafted with great generality, the risk is unconstitutional ensnarement of innocent, constitutionally protected conduct."<sup>48</sup> Because of these factors, only a reasonable degree of certainty is demanded.<sup>49</sup>

The four elements most carefully scrutinized in decisions interpreting stalking statutes under vagueness challenges are: 1) the intent required; 2) an act requirement; 3) an objective standard for interpreting

44. See *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982).

45. See *id.*

46. See *id.* at 494-95, 499. If a statute does not implicate any constitutional activity, a court should invalidate the statute only if it is vague in all of its applications. See *id.* at 494-95. If Constitutional freedoms are removed from the statute's scope, an individual "who engages in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* at 495. See also *United States v. Mazurie*, 419 U.S. 544, 550 (1975). "[S]tatutes which do not involve First Amendment freedoms must be examined in the light of the facts in the case at hand." *Id.*

47. See *Grayned*, 408 U.S. at 110.

48. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-31, at 1033 (2d ed. 1988). This concern weighed heavily on the minds of legislators professing the need for stalking legislation. See, e.g., Ward, *supra* note 27, at 615. U.S. Senator William Cohen introduced a bill to assist states in developing stalking legislation. See *id.* His motivation in doing so grew out of a concern "that states would draft legislation too narrowly, rendering them essentially meaningless, or too broadly, making them unconstitutional." *Id.*

49. See *Boyce Motor Lines Inc. v. United States*, 342 U.S. 337, 340 (1952).

The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

*Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

the crime's effect on a victim; and 4) actual harm or effect on the victim.<sup>50</sup> None of these factors is dispositive, nor are all addressed in every decision interpreting stalking statutes for vagueness.

#### IV. VAGUENESS AND MINNESOTA'S STALKING STATUTE

The following analysis will demonstrate that Minnesota's amended stalking statute is unconstitutionally vague for reasons apart from those suggested in the *Orsello* dicta. Part IV-(A) will establish that the legislature's amendment making stalking a general intent crime is not fatal, as suggested by the court in *Orsello*.<sup>51</sup> While most stalking statutes require specific intent, specific intent does not automatically validate an otherwise vague statute. This is evidenced by the fact that specific intent stalking statutes have been held unconstitutionally vague.<sup>52</sup> Moreover, by incorporating a narrowly drawn act requirement, the Minnesota statute provides a person of ordinary intelligence an opportunity to know what is prohibited and provides explicit standards that prevent arbitrary and discriminatory enforcement.<sup>53</sup> Finally, general intent statutes have been upheld against vagueness challenges.<sup>54</sup>

Although the statute is not unconstitutional because of its general intent requirement, Part IV-(B)(1) will reveal that the legislature's amendment removing the "reasonable person" standard from the definition of the crime renders the statute vague. This is so because the resulting subjective standard brings within the statute's scope constitutionally protected activity<sup>55</sup> and is repugnant to the due process vagueness concerns regarding notice and enforcement.<sup>56</sup> Part IV-(B)(2) proposes that the new definition of the crime requiring that a stalker know that his or her conduct would intimidate or harass the victim may have defeated the legislature's purpose in establishing stalking as a general intent crime. The clause introduces ambiguity into the definition of the crime regarding the mental element required.<sup>57</sup>

---

50. See generally Bjerregaard, *supra* note 16, at 334-41 (listing all stalking statutes and identifying the "limiting elements" in the statutes). A few statutes also require a "threat" be communicated as an element of the crime. See Boychuk *supra* note 12, at 778. Most states do not include a threat requirement in their stalking statutes, however, because it makes the statute much more difficult to enforce. *Id.* at 779 (listing states that removed the threat requirement from their stalking laws as originally enacted). Minnesota's statute does not contain a threat requirement as an element of the crime.

51. See *Orsello*, 554 N.W.2d at 76.

52. See *infra* notes 61-65.

53. See *infra* notes 73-78 and accompanying text; see also *supra* notes 38, 40 and accompanying text.

54. See *infra* notes 79-84.

55. See *infra* notes 101-113 and accompanying text.

56. See *infra* notes 114-21 and accompanying text.

57. See *infra* notes 129-34 and accompanying text.

### A. *The Intent Element in Stalking Statutes: Is General Intent Unconstitutional?*

In its brief discussion addressing the constitutionality of Minnesota's stalking statute, the supreme court in *Orsello* observed that most stalking statutes surviving vagueness challenges have included specific intent as an element of the crime.<sup>58</sup> Of the twenty-seven statutes challenged for vagueness or overbreadth, twenty-four are specific intent statutes.<sup>59</sup> Specific intent, however, does not guarantee that a statute provides sufficient notice of prohibited conduct, nor does it ensure a statute provides adequate guidance for those charged with enforcing it. Furthermore, Alaska, Michigan, and Washington have general intent stalking statutes that have been upheld against vagueness challenges.<sup>60</sup>

#### 1. *Specific Intent Statutes Held Unconstitutional*

Two of the three reported decisions holding stalking statutes uncon-

---

58. See *State v. Orsello*, 554 N.W.2d 70, 77 (Minn. 1996); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 3.5(e), at 315 (1986). Specific intent designates "a special mental element which is required above and beyond any mental state required with respect to the [act] of the crime." *Id.* For example, "burglary requires a breaking and entry into the dwelling of another, but in addition to the mental state connected with these acts it must also be established that the defendant acted with 'intent to commit a felony therein.'" *Id.* (quoting MODEL PENAL CODE § 8.13(e)(1962)). This was the standard employed by the court in *Orsello*. See *Orsello*, 554 N.W.2d at 72. Specific intent requires that the defendant acted with the intention to produce a specific result. See *id.* (emphasis in original). Conversely, general intent requires only that a defendant engaged intentionally in prohibited conduct. See *id.*

59. These statutes establish specific intent as an element of the crime variously, with language such as: "with intent to cause . . ." See, e.g., ALA. CODE § 13-A-6-90(a) (Supp. 1997); CAL. PENAL CODE § 646.9(a) (Supp. 1998). Other statutes use the language "purposefully or knowingly causes . . ." See MONT. CODE ANN. § 45-5-220(1) (1996). The Georgia code uses the language "for the purpose of harassing . . ." See GA. CODE ANN. § 16-5-90(a) (1996). Oklahoma requires that one "willfully, maliciously follow[] or harass . . ." See OKLA. STAT. § 1173(a) (Supp. 1998). Other states use the language of "knowing[ly] cause . . ." See, e.g., OHIO REV. CODE § 2903.211(A) (1997); UTAH CODE ANN. § 76-5-106.5(2)(a) (1995). Some decisions upholding a statute's constitutionality assert that specific intent negates a stalker's contention that a statute is vague. See, e.g., *Culbreath*, 667 So. 2d at 159 (declaring that where a stalker has specific intent to bring about a particular effect, he or she is presumed to be on notice that his or her actions constitute a crime); *People v. Heilman*, 30 Cal. Rptr. 2d 421, 428 (Cal. Ct. App. 1994) (asserting that specific intent defeats the argument that law enforcement would unfairly apply a law). Some statutes do not expressly incorporate specific intent but have nevertheless had that element imputed by courts. See *infra* note 131.

60. See *Petersen v. State*, 930 P.2d 414, 418 (Alaska Ct. App. 1996); *People v. White*, 536 N.W.2d 876, 883 (Mich. Ct. App. 1995); *State v. Lee*, 917 P.2d 159, 166 (Wash. Ct. App. 1996). See also *infra* notes 79-84 and accompanying text.

stitutional dealt with statutes that contained a specific intent element. In *Commonwealth v. Kwiatowski*,<sup>61</sup> the Massachusetts Superior Judicial Court held that state's stalking statute unconstitutional despite a specific intent element. The court declared that the uncertain meaning of "repeated patterns of conduct" or "repeated series of acts" rendered the statute vague for "lacking any discernible unambiguous application," thereby failing to give a person of ordinary intelligence fair notice of what conduct is forbidden.<sup>62</sup> In *Long v. State*,<sup>63</sup> the Texas Court of Criminal Appeals held that state's stalking statute unconstitutionally vague, reasoning that the specific intent element did not solve the vagueness of the underlying conduct criminalized by the vague terms "annoy" and "alarm."<sup>64</sup> These decisions demonstrate that a statute merely requiring someone to specifically intend to harass, without defining the terms or conduct proscribed, may still be vague.<sup>65</sup>

Rather than an absolute cure for constitutional infirmity, specific intent merely affords statutes under vagueness attack the benefit of less strenuous scrutiny. In *State v. Saunders*, the Superior Court of New Jersey held that the defendant's claim that that state's stalking statute was vague failed "because the statute requires specific intent."<sup>66</sup> The court reasoned that the specific intent required *modified any phrases that could possibly be deemed vague, so that they were not vague*.<sup>67</sup> In *People v. Heilman*, the court declared that it was the stalker's intent, rather than the definition of the conduct engaged in, which triggered the applicability of the statute, adding that specific intent may validate an *otherwise vague or indefinite statute*.<sup>68</sup>

Two other decisions upholding specific intent statutes further exemplify courts' relaxed attitude in examining the conduct criminalized in statutes under vagueness challenges if specific intent is an element of the crime. Like the statute ruled unconstitutional in *Long*,<sup>69</sup> these statutes defined the underlying conduct loosely with poorly drafted "act" require-

61. 637 N.E.2d 854 (Mass 1994).

62. *Id.* at 857. The court held that the statute's definition of "harasses" rendered the statute vague for requiring a repetition of either a pattern of conduct or a series of acts. *See id.* The court reasoned that a single pattern of conduct or a single series of acts was presumably intended by the legislature. *See id.*

63. 931 S.W.2d 285 (Tex. Crim. App. 1996) (en banc).

64. *Id.* at 289. The court listed other provisions that rendered the statute unconstitutional as well, including its lack of a reasonable person standard for interpreting the effect of the conduct on a victim. *See id.* This concern is addressed in Part IV(B)(2), *infra* (asserting that the lack of a reasonable person standard in Minnesota's statute renders the statute vague).

65. *See Boychuk, supra* note 12, at 796.

66. *See State v. Saunders*, 695 A.2d 722, 729 (N.J. Super. Ct. App. Div. 1997).

67. *Id.* (emphasis in text added); *see also Boychuk, supra* note 12, at 796 (declaring that courts generally look more favorably on laws that require specific intent).

68. *People v. Heilman*, 30 Cal. Rptr. 2d 421, 428 (Cal. Ct. App. 1994).

69. *See supra* notes 63-64 and accompanying text.

ments. In *State v. Culmo*, the Superior Court of Connecticut held that specific intent “significantly vitiates” a claim that a statute’s purported vagueness would mislead a person of common intelligence into misunderstanding what conduct is prohibited.<sup>70</sup> The court declared that “[i]t is not necessary that a statute list the precise actions prohibited by it to survive a vagueness attack.”<sup>71</sup> The Indiana Court of Appeals expressed a similar view in *Johnson v. State* when it upheld that state’s specific intent statute, proclaiming that a statute need not list in detail each type of conduct prohibited.<sup>72</sup>

## 2. Minnesota’s Narrowly Drawn Act Requirement

In stark contrast, Minnesota’s stalking statute has a definitive, narrowly drawn act requirement, listing which “acts” constitute stalking.<sup>73</sup> Commentators have asserted that a narrowly defined act requirement, even without specific intent, satisfies vagueness concerns.<sup>74</sup> Listing the acts that constitute stalking mitigates against arbitrary enforcement; because the acts prohibited are set out by list, the discretion of law enforcement officers is limited.<sup>75</sup> Listing specific acts also puts an average person on notice of what conduct is prohibited by the statute.<sup>76</sup> In *Peterson v. State*, the Alaska Court of Appeals noted the general intent statute’s “limiting definition of the phrase ‘course of conduct,’” augmented by a list of acts constituting stalking, in denying the defendant’s vagueness chal-

70. See *State v. Culmo*, 642 A.2d 90, 98 (Conn. Super. Ct. 1993).

71. See *id.* at 97 (quoting *State v. Eason* 470 A.2d 688, 693 (Conn. 1984)).

72. See *Johnson v. State*, 648 N.E.2d 666, 670 (Ind. App. 1995).

73. See MINN. STAT. § 609.749 subd. 2 (West 1997). The statute identifies the following acts as “stalking”:

- (1) directly or indirectly manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act;
- (2) stalks, follows, or pursues another;
- (3) returns to the property of another if the actor is without claim of right to the property or consent of one with authority to consent;
- (4) repeatedly makes telephone calls, or induces a victim to make telephone calls to the actor, whether or not a conversation ensues;
- (5) makes or causes the telephone of another repeatedly or continuously to ring;
- (6) repeatedly uses the mail or delivers or causes the delivery of letters, telegrams, packages, or other objects, or
- (7) engages in any other harassing conduct that interferes with another person or intrudes on the person’s privacy or liberty.

*Id.*

74. See Faulkner & Hsiao, *supra* note 12, at 51.

75. See Ward, *supra* note 27, at 640-41 (asserting that where acts are listed there is not much room for subjective interpretation by those who enforce the law). See also *supra* note 41 and accompanying text (noting that the more important aspect of the vagueness doctrine is the requirement that a legislature establish guidelines to govern law enforcement).

76. See *id.* at 641 (listing the acts that constitute stalking ensures the average citizen understands what actions are prohibited).

lenge,<sup>77</sup> asserting that “this conduct, by itself, constituted stalking.”<sup>78</sup> Like Alaska’s statute, Minnesota’s stalking statute embodies such a narrowly drawn act definition and helps overcome any vagueness concerns flowing from its general intent requirement.

### 3. *General Intent Statutes Held Constitutional*

Further negating the notion that specific intent is required for a stalking statute to withstand a constitutional attack is the fact that stalking statutes requiring only general intent have been upheld against vagueness attacks. Alaska,<sup>79</sup> Michigan,<sup>80</sup> and Washington<sup>81</sup> have general intent stalking statutes that have been held constitutional. In *State v. Lee*, the Washington Court of Appeals specifically rejected the defendant’s contention that the statute was vague for not requiring that the defendant act with a specific intent to cause harm, holding that the absence of a specific intent element did not render the statute vague.<sup>82</sup> In *People v. White*, the Michigan Court of Appeals rejected the defendant’s contention that his conduct was the result of his relationship with his victim and not the result of any criminal intent.<sup>83</sup> The court held that the statute prohibited unconsented contact with a victim regardless of his romantic intentions.<sup>84</sup>

The *White* decision highlights the policy reason why general, rather than specific intent, should be the standard in stalking statutes. On a practical level, requiring specific intent as an element of stalking fails to recognize that many stalkers do not intend to hurt or frighten their victim.<sup>85</sup> A significant portion of stalkers have some type of mental illness,<sup>86</sup>

77. *Petersen v. State*, 930 P.2d 414, 423-24 (Alaska Ct. App. 1996).

78. *Id.* at 424

79. *See id.*

80. *See People v. White*, 536 N.W.2d 876, 885 (Mich. Ct. App. 1995).

81. *See State v. Lee*, 917 P.2d 159, 170 (Wash. Ct. App. 1996).

82. 917 P.2d at 167. “The conduct proscribed by the statute is clear: One may not follow another person in such a way as to cause the person to experience a reasonable sense of fear.” *Id.*

83. *See White*, 536 N.W.2d at 883.

84. *See id.* at 883-84.

85. *See Brooks*; *supra* note 20, at 274. Many stalkers are obsessed with their victims at a level of mental disturbance and wish only to express love or affection to their victims. *See id.* *See also Sohn*, *supra* note 13, at 220. The largest hindrance to enforcement of stalking statutes occurs where stalking is a specific intent crime. *See id.* Considering the type of behavior in question, a specific intent requirement may prove to be an insurmountable obstacle in many cases because many stalkers do not intend to hurt or frighten their victim. *See id.* at 221. If specific intent is required, it is not sufficient that the victim is actually fearful or intimidated. *See id.* at 220. *See also infra* note 87 (detailing the psychological profiles of stalkers to demonstrate the impracticality of a specific intent requirement in these crimes).

86. *See Bjerregaard*, *supra* note 16, at 308. Several jurisdictions, including Minnesota, have implicitly recognized stalkers are acting under some sort of mental hindrance by incorporating provisions in their stalking statutes calling for a

an assertion supported by current psychological, psychiatric, and forensic literature.<sup>87</sup> Therefore, to require that a stalker specifically intend to op-

---

mental health assessment for people convicted of stalking. See, e.g., MICH. COMP. LAWS ANN. § 750.411h(3)(c) (West Supp. 1997); CAL. PEN. CODE § 646.9(l) (West Supp. 1998); MINN. STAT. § 609.749 subd. 6 (Supp. 1998). Minnesota's stalking statute reads:

When a person is convicted of a felony offense under this section, or another felony offense arising out of a charge based on this section, the court shall order an independent professional mental health assessment of the offender's need for mental health treatment. The court may waive the assessment if an adequate assessment was conducted prior to the conviction.

MINN. STAT. § 609.749 subd. 6 (1996).

87. See McAnaney, *supra* note 13, at 831. Current psychological literature identifies four stalker profiles. See *id.* Three of these stalker profiles, the delusional erotomaniac, the borderline erotomaniac, and the former intimate stalker suggest specific intent is impractical, while a fourth type of stalker profile, the sociopathic stalker, is not eliminated from a statute's scope by a specific intent requirement, because the Sociopathic Stalker clearly and specifically intends to intimidate his or her victim. See *id.*

The first type of stalker, the Delusional Erotomaniac truly believes he or she is loved by another individual and *intends to establish an intimate, even permanent, relationship* with the object of his or her fantasy. See *id.* at 833 (emphasis added). This stalker believes his or her role as suitor is warranted and that his or her target reciprocates an intensity of emotion and desire for union despite the absence of any actual relationship or emotional reciprocity. See *id.* at 833-34. To require that this type of stalker specifically intend to "oppress, persecute or intimidate" the object of his or her fantasy is absurd.

The second type of stalker, the Borderline Erotomaniac, develops intense emotional feelings, often as a result of trivial contact such as an innocuous glance. See *id.* at 836. These stalkers vacillate between attitudes of love and hate towards other individuals *who they know do not reciprocate* their feelings. See *id.* at 835. This stalker feels abandoned and rejected when his or her feelings are not reciprocated. See *id.* at 837. He or she acts out of "clingy desperation" to win the others' affection, *intending to fill a void or keep from being abandoned.* See *id.* at 836 (emphasis added). Requiring a person so disturbed so as to be easily enticed into a relationship that never existed, who acts out of desperation to fill a void, to specifically intend to persecute his or her victim is also unreasonable.

The third type of stalker, the Former Intimate Stalker, has had an intimate relationship with their target and refuses to be rejected. See *id.* at 839. The Former Intimate is intensely emotionally dependent, may experience feelings of jealousy, and exhibit a significant need to control their former partner. See *id.* at 839-41. In many cases, these stalkers have a prior history of abusive relationships and many of these cases result in assault and even death. See *id.* at 839. Former Intimates regard their targets as personal possessions that can be treated as such, and their propensity to apply force to exert control or domination over their victims is widely accepted by clinicians. See *id.* at 841. It is less unreasonable to require specific intent of this stalker. However, because he or she is more violence-prone, and considering stalking statutes are intended to prevent harassing behavior before it escalates to violence, see *supra* note 21 and accompanying text, requiring general intent seems most logical. The former intimate stalker may claim his or her intentions were merely those of a loving spouse or partner expressing feel-



press, persecute, or intimidate, as the court did in *Orsello*, renders stalking statutes underinclusive and inapplicable in many circumstances.<sup>88</sup>

It is illustrative to examine the circumstances in which one of the cases cited in *Orsello* applied that state's specific intent stalking statute. In *Heilman*, the California Court of Appeal applied that state's statute in a situation where the stalker had threatened his victim with, among other things, a note which read, "I'm going to make your life miserable."<sup>89</sup> Because the stalker had communicated his intent, the specific intent requirement was easily met. The statute would not, however, apply to several other types of stalking behavior, such as where a stalker merely sends flowers or notes professing love or devotion,<sup>90</sup> or, as was the case in *Orsello*, where the stalker attributed his behavior to that of a loving husband trying to "save his marriage and stay in contact with his family."<sup>91</sup>

In conclusion, specific intent does not *per se* overcome a vagueness challenge, as is evidenced by two decisions holding specific intent stalking

ings for a former partner or an attempt to rekindle the relationship.

The facts in *State v. Orsello* illustrate this point. See 529 N.W.2d 481, 483 (Minn. Ct. App. 1995). Diane and Paul Orsello were divorced in November, 1992. See *id.* at 482. In November of 1993, Diane charged Paul under Minnesota's stalking statute for a series of incidents dating back to June of that year. After Diane pressed these charges, Paul's conduct intensified (Paul challenged Diane to a fight, pulled out a gun in a case and said he "hoped it wouldn't go off," told Diane to "burn in hell," refused to discuss pick-up times when he took the children, and left notes asserting that judges and social workers were manipulating Diane to break up his family.) See *id.* at 482-83. Paul admitted committing all of the incidents alleged to be harassment, but characterized his behavior as that of a loving husband and father seeking to reunite with his ex-wife and children. See *id.* He characterized Diane as overly sensitive. See *id.* In his brief to the supreme court appealing his conviction, Paul Orsello insisted that his "only shortcoming [was] that he tried too hard and long to save his marriage and stay in contact with his children." Petitioner's Brief at 7, *Orsello* (No. C2-94-1435).

This "domestic stalking" accounts for 80 percent of all stalking cases. See Bjerregaard, *supra* note 16, at 308. This statistic is important for two reasons. First, because this type of stalker is most likely to culminate his or her activity in violence, a general intent requirement is necessary so these stalkers cannot avoid prosecution by claiming they only intended to rekindle the romance. Secondly, if 200,000 people are stalked each year, see *supra* note 14 and accompanying text, then a full 40,000 of those stalkers are delusional or borderline erotomaniacs, who clearly do not have the intent to intimidate or frighten their victims. Since general intent is the necessary standard to criminalize delusional and borderline erotomaniac's conduct, requiring a different intent level for a Former Intimate stalker would create confusion and involve the courts and prosecutors in ad hoc psychiatric analysis to determine the level of intent required for different stalkers.

88. See Faulkner & Hsiao, *supra* note 12, at 50-51 (maintaining that California's stalking statute is underinclusive for excluding more erotomaniacal conduct than is necessary).

89. See *People v. Heilman*, 30 Cal. Rptr. 2d 421, 424 (Cal. Ct. App. 1994).

90. See *supra* note 13.

91. See Petitioner's Brief at 7, *Orsello* (No. C2-94-1435); see also *supra* note 87.

statutes unconstitutional for inadequately defining the underlying conduct.<sup>92</sup> Specific intent statutes merely benefit from less exacting scrutiny under a vagueness attack.<sup>93</sup> Minnesota's narrowly drawn act requirement addresses the vagueness concerns regarding notice and enforcement.<sup>94</sup> Moreover, general intent statutes have withstood vagueness challenges; general intent is the necessary standard to ensure the stalking statute pulls within its scope all types of stalkers.<sup>95</sup> However, even though the foregoing aspects of the amended stalking statute do not render it unconstitutional, other aspects of the statute are constitutionally infirm. These are discussed in Part IV(B)(1)-(2).

### B. *Displacing the Objective Standard*

In addition to the amendment making Minnesota's stalking statute a general intent crime, the legislature amended the definition of stalking.<sup>96</sup> The statute interpreted by the court in *Orsello* defined the crime as "... intentional conduct . . . that would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated and causes this reaction on the part of the victim."<sup>97</sup> The amended statute displaced the objective reasonable person standard with a more subjective one, defining the crime as "intentional conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated and causes this reaction on the part of the victim."<sup>98</sup> Part IV(B)(1) will illustrate that removing the reasonable person element renders this statute unconstitutionally vague.<sup>99</sup> Part IV(B)(2) will illustrate that the new definition of the crime introduced ambiguous language into the statute that may, *de facto*, negate the provision eliminating specific intent as an element of the crime.<sup>100</sup>

#### 1. *The Subjective Standard is Unconstitutional*

Twenty-four of the twenty-seven stalking statutes courts have interpreted under vagueness challenges incorporated a reasonable person standard for interpreting the impact of the stalkers conduct on his or her victim.<sup>101</sup> Of the remaining three statutes, two were deemed unconstitu-

92. See *supra* notes 61-65 and accompanying text.

93. See *supra* notes 66-72 and accompanying text.

94. See *supra* notes 73-78 and accompanying text.

95. See *supra* notes 79-91 and accompanying text.

96. See *supra* note 36 and accompanying text.

97. MINN. STAT. § 609.749 subd. 1(1)(2) (1996) (emphasis added).

98. MINN. STAT. § 609.749 subd. 1(1)(2) (Supp. 1997) (emphasis added).

99. See *infra* notes 101-128 and accompanying text.

100. See *infra* notes 129-134 and accompanying text.

101. This standard is manifested in twenty-three of the statutes by statutory language criminalizing conduct "that would cause a reasonable person to feel . . ."

tional for lacking an objective standard.<sup>102</sup> In contrast, Minnesota's statute relies solely on the subjective "causes this reaction on the part of the victim" to determine if a person is guilty of stalking.<sup>103</sup> In this respect, Minnesota's statute is unconstitutional for failing to specify a standard of conduct at all.<sup>104</sup>

---

or that "would place a person in reasonable fear . . ." See ALA. CODE §§ 13-A-6-90(a) (1992); CAL. PEN. CODE § 646.9(a) (West 1993); CONN. GEN. STAT. §§ 53a-181d(a) (West 1994); D.C. CODE ANN. § 22-504(b) (1996); DEL. CODE ANN. tit. 11, §1312A(a) (1992); FLA. STAT. ANN. ch. 784.048(3) (1992) (West Supp. 1998); GA. CODE ANN. § 16-5-90(a) (1993); ILL. COMP. STAT. 5/12-7.3(a) (West 1996); IND. CODE ANN. § 35-45-10-5(b)(1)(B) (West 1997); KY. REV. STAT. ANN. § 508.140(1)(a)(2) (Michie 1996); MASS. GEN. LAWS ANN. ch. 265, § 43(a) (West 1996); MICH. COMP. LAWS ANN. § 750.411h(1)(c)(d) (West 1996); MONT. CODE ANN. § 45-5-220(1) (1996); N.J. STAT. ANN. § 2C: 12-10(a)(1) (West 1996); OKLA. STAT. tit. 21, § 1173(A)(1) (1996); OR. REV. STAT. § 163.732(1)(b) (1995); PA. STAT. ANN. tit. 18, § 2709(b)(1) (1996); R.I. GEN. LAWS § 11-59-2(a)(ii) (1994); S.D. CODIFIED LAWS § 22-19A-1(2) (Michie 1996); UTAH CODE ANN. § 76-5-106.5(2)(a)(I-ii), (b)(I) (1996); VA. CODE ANN. § 18.2-60.3(A) (Michie 1996); WASH. REV. CODE ANN. § 9A.46.110(1)(b) (West 1996); WYO. STAT. ANN. § 6-2-506(b) (Michie 1996). The twenty-fourth statute, Alaska's, does not expressly contain an objective standard. See ALASKA STAT. § 11.41.270 (a) (Michie 1993). However, the objective standard was imputed in *Petersen*, where the Alaska Court of Appeals, quoting statutory language, held that "proof that a [stalker] 'recklessly' placed another person in fear of injury implicitly requires proof that the victim's fear was reasonable." *Petersen v. State*, 930 P.2d 414, 431 (Alaska Ct. App. 1996).

102. See generally *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996); *State v. Bryan*, 910 P.2d 212 (Kan. 1996). The remaining statute, Ohio's, does not incorporate an objective standard and is the only statute lacking that standard that has been upheld under a vagueness attack. See OHIO REV. CODE ANN. § 2903.211 (West 1995). In the case upholding that statute, however, the defendant did not raise the First Amendment issue as applied to vagueness, and the court interpreted the statute against the due process provisions regarding notice and enforcement only. See *Dayton*, 646 N.E.2d at 919. The court's only mention of First Amendment freedoms in its vagueness analysis intermingled overbreadth language, declaring that the statute was aimed at harmful conduct that the state had an interest in controlling. See *id.* See also *Boychuk supra* note 12, at 801 (asserting that Ohio's statute is vague for lacking an objective standard against which to measure the reaction of the victim).

103. See MINN. STAT. ANN. § 609.749 subd. 1(1),(2) (Supp. 1997). This is not meant to imply that this provision is per se unconstitutional. Most statutes require that the victim suffer actual harm. See, e.g., DEL. CODE ANN. tit. 11, §1312A(a) ("... and whose conduct induces such fear..."); OKLA. STAT. tit. 21, § 1173(A)(1992) ("... and [a]ctually causes the person ... to feel terrorized..."). Rather, the contention here is that this standard, as the sole determinant as to whether activity is criminalized under the code, renders the statute unconstitutional. See *infra* notes 105-28 and accompanying text.

104. See *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). Conduct that annoys some people does not annoy others. See *id.* Thus, the ordinance is vague, not because it requires a person to conform his or her conduct to an imprecise standard, but rather because no standard of conduct is specified at all. See *id.*

The primary impact of an objective standard on a statute's constitutionality is that it removes constitutionally protected behavior from the statute's ambit<sup>105</sup> by ensuring that only blameworthy behavior is punished.<sup>106</sup> In *Long*, the court cited the absence of a reasonable person provision that would specify a more serious state of harm on the part of a victim than mere annoyance.<sup>107</sup> The court articulated the importance of eliminating constitutionally protected behavior from a statute's scope, asserting that if the First Amendment activity is removed from the statute's scope, then it can be examined under the more deferential due process standards and is more likely to survive scrutiny.<sup>108</sup>

Jurisdictions upholding stalking statutes against vagueness attacks explicitly recognize the role an objective standard plays in removing constitutionally protected behavior from a statute's scope. In *State v. Rangel*,<sup>109</sup> the Oregon Court of Appeals reasoned that the statute's requirement that

---

105. It is important to note that the provision in Minnesota's stalking statute expressly removing constitutionally protected activity from the statute's scope, *see supra* note 33, while negating overbreadth challenges, does not automatically negate a vagueness challenge. *See, e.g.,* Faulkner & Hsiao, *supra* note 12, at 26-27 (asserting that although courts treat overbreadth and vagueness together, it is more analytically correct to say that statutes expressly exempting constitutionally protected activity exchange overbreadth for vagueness). The authors therein quote Professor Tribe, who illustrates the interplay between vagueness and overbreadth with a hypothetical statute: "It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments." *Id.* Tribe notes that while this hypothetical statute is guaranteed not to be overbroad since its terms forbid nothing the Constitution protects, the statute is nonetheless "patently vague." *See id.* This is because it is unreasonable to expect citizens and law enforcement officials to be constitutional scholars. *See id.* Therefore, while the provision in Minnesota's stalking statute protecting constitutional activity may overcome an overbreadth challenge, the statute may still be vulnerable to a vagueness challenge if written so vaguely so as to infringe on First Amendment freedoms. *See also supra* notes 42-46 and accompanying text.

106. *See* Bjerregaard, *supra* note 16, at 320. The author cited decisions where the reasonable person standard overcomes overbreadth challenges by narrowing the scope of the statute and limiting its application only to blameworthy conduct. *See id.* One of the principal difficulties with analyzing stalking statutes on vagueness grounds is that discussions on vagueness are often intertwined with overbreadth. *See* Boychuk *supra* note 12, at 772; *see also* Bjerregaard, *supra* note 16, at 321 (opining that since vagueness and overbreadth analysis is often commingled in court opinions, the exact basis for court's holdings are sometimes unclear). However, because First Amendment considerations apply to the vagueness doctrine, the principal concern is whether the statute removes constitutionally protected behavior from its scope. *See supra* note 105 (asserting that First Amendment concerns apply to vagueness, despite express statutory provision eliminating constitutionally protected activity from its scope); *see also supra* notes 42-46 and accompanying text (recounting that First Amendment concerns are the threshold consideration in vagueness analysis).

107. *See* *Long v. State*, 931 S.W.2d 285, 292 (Tex. Crim. App. 1996).

108. *See id.* at 293; *see also supra* note 45-46 and accompanying text.

109. 934 P.2d at 1128 (Or. Ct. App. 1997).

harm be objectively reasonable paralleled another harassment statute and focused on the harmful *effect of speech, rather than speech itself*.<sup>110</sup> In *People v. White*,<sup>111</sup> the Michigan Court of Appeals disagreed with the defendant's claim that the statute unconstitutionally infringed on his First Amendment right to free speech by permitting a victim to subjectively determine which telephone calls are acceptable and which are criminal.<sup>112</sup> Instead, the court reasoned that the statute criminalized conduct combined with speech that would cause a *reasonable person* to feel terrorized, threatened, or harassed.<sup>113</sup> By ensuring that only blameworthy activity is proscribed, the reasonable person standard negates the contention that a statute infringes on free speech or association.

In addition to removing constitutionally protected activity from the statute's reach, an objective standard also helps satisfy the due process provision of the vagueness doctrine regarding notice and enforcement. As for notice, the reasonable person standard ensures proscribed conduct does not vary with the psychological makeup of the victim.<sup>114</sup> In *State v. Bryan*,<sup>115</sup> the Supreme Court of Kansas held the 1994 version of that state's stalking statute was unconstitutionally vague because it lacked an objective standard for measuring when "following" harassed a victim.<sup>116</sup> The court determined this to be "dangerous" because it "subject[ed] the defendant to the particular sensibilities of the individual victim."<sup>117</sup> The court reasoned that a defendant could be found guilty of stalking under the statute, even though a reasonable person in the same situation would not be alarmed, annoyed, or harassed by the defendant's conduct.<sup>118</sup> By ensuring the conduct proscribed does not vary with the particular psychological

---

110. See *id.* at 1130, 1132.

111. 536 N.W.2d 876 (Mich. Ct. App. 1995).

112. See *id.* at 882.

113. See *id.* at 883.

114. See *Woolfolk*, 447 S.E.2d at 535; see also *Pallas v. State*, 636 So. 2d at 1358, 1364 (Fla. Dist. Ct. App. 1994) (denying defendant's claim that statute's definition of "harass" subjects a stalker to conviction based on the "unusual sensitivities" of his victim. The Court declared that the statute's reasonable person standard negates this contention); *Monhollen v. Com.*, 947 S.W.2d 61, 63 (Ky. Ct. App. 1997) (declaring that reasonable person standard ensures conduct is not determined by the victim's subjective feelings); *Johnson v. State*, 449 S.E.2d 94, 96 (Ga. 1994) (holding that statute was not vague because a person of ordinary intelligence could readily understand what action would provoke a reasonable fear of harm).

115. 910 P.2d 212 (Kan. 1996).

116. See *id.* at 218, 220.

117. See *id.* at 220. Different persons have different sensibilities, and conduct which annoys or alarms one person may not annoy or alarm another. See *id.* The victim may be of such a state of mind that conduct which would never annoy, alarm, or harass a reasonable would seriously annoy, alarm or harass this victim. See *id.*

118. See *id.* at 220.

makeup of the victim, the objective standard protects citizens who engage in non-threatening day-to-day contact with others from surprise prosecutions.<sup>119</sup>

The reasonable person standard also protects a person against arbitrary and discriminatory enforcement. In *Johnson*, the court held the reasonableness standard "provides a constraining and intelligible enforcement standard for those charged with enforcing the statute."<sup>120</sup> A reasonable fear element restrains law enforcement officers who investigate reports of stalking from arbitrarily arresting an alleged stalker because they have an objective baseline against which to evaluate the victim's complaint.<sup>121</sup>

The provision in Minnesota's statute requiring a stalker "know or have reason to know" his or her conduct would cause a victim to feel oppressed<sup>122</sup> will not save the statute from vagueness.<sup>123</sup> It is unreasonable to require that a person "know or have reason to know" his or her activities will cause this reaction in an unusually sensitive person. The provision, without a reasonable person standard, could infringe on constitutionally protected freedoms by leading citizens "to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."<sup>124</sup> For example, any protester knows or has reason to know his or her activity causes another to feel oppressed or persecuted; in fact, that is the objective.<sup>125</sup>

---

119. See *Parker v. Commonwealth*, 485 S.E.2d 150, 153-54 (Va. Ct. App. 1997); see also *Johnson*, 449 S.E.2d at 96 (holding that the effect of the objective standard is to remove those who only inadvertently make contact with another person).

120. *Johnson v. State*, 648 N.E.2d 666, 670 (Ind. App. 1995); see also *People v. Holt*, 649 N.E.2d 571, 580 (Ill. App. Ct. 1995) (asserting that the objective standard for the effect of the stalker's conduct on a victim avoids arbitrary or discriminatory enforcement).

121. See *Parker*, 485 S.E.2d 150 at 154; see also *Culbreath v. State*, 667 So. 2d 156, 162 (Ala. Ct. App. 1995) (asserting that statute's requirement that harassing conduct be that which would cause a reasonable person harm prevents arbitrary enforcement). See generally *Boychuk*, *supra* note 12, at 801 (stating that a statute lacking a reasonable person standard for measuring a victim's reaction to the behavior leaves it to the discretion of the police and the victim to decide if the acts constitute stalking).

122. See *supra* note 36 and accompanying text.

123. See *infra* notes 129-34 and accompanying text.

124. See *supra* note 43 and accompanying text.

125. See, e.g., *Faulkner & Hsiao*, *supra* note 12, at 48 (providing the example that repeated following would subject an abortion protester to arrest since, arguably, the protester should know that the activity would cause reasonable fear in light of violence sometimes associated with abortion issue). A minor twist on the example illustrates the problem with basing arrest in Minnesota solely on the subjective reaction of the person being protested. Despite Minnesota's statutory provision exempting constitutionally protected behavior, any protester, on any issue, may avoid protesting activity if they know it harasses the person and arrest is based solely on that person feeling distressed. Considering that citizens are not ex-

Moreover, the subjective standard could result in the statute being abused by alleged victims to rid themselves of people who merely aggravate them, as in an acrimonious divorce. A parent who innocently wishes to maintain contact with his or her children could be barred from doing so, infringing on his or her constitutional right of association, if his or her spouse is upset or *unreasonably* feels intimidated by his or her presence. A spouse who is aware of his former mate's sensitivity and maintains contact violates Minnesota's stalking statute as currently written.

Absent an objective standard for defining conduct criminalized under the statute, not even the statute's listing of the activities constituting stalking<sup>126</sup> can save the statute from constitutional infirmity. Any of the acts listed could conceivably infringe on First Amendment freedoms or subject an individual to arbitrary or discriminatory enforcement and surprise prosecution if criminalization is based on the peculiar sensitivities of the individual victim.

In conclusion, the reasonable person standard serves to remove constitutionally protected behavior from the statute's scope by ensuring only harmful conduct is criminalized. It also satisfies the due process vagueness concerns regarding notice and enforcement. Irrespective of how narrowly drawn a statute's act requirement is, if these acts are criminalized based solely on the peculiar sensitivities of a victim, the statute fails to specify any standard of conduct at all. In his dissent in *Orsello*, Justice Stringer correctly observed that the 1996 version of Minnesota's stalking statute already had a "protective device" that would prevent an unwarranted application of the statute.<sup>127</sup> That "device," he argued, was the requirement that the proscribed conduct be of a nature to cause a reasonable person to feel oppressed.<sup>128</sup>

## 2. *The Standard "Know or Have Reason to Know" is Ambiguous*

Minnesota's statutory requirement that the actor "knows or has reason to know [his or her] conduct would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated" is ambiguous in light of the statute's provision declaring that

---

pected to be constitutional scholars, *see supra* note 105, these people may nonetheless steer wider of the protected zone than if the applicability of the statute was limited to an objective standard. With an objective standard, inevitably, a person's occupation or rank in a business or other entity would be one of the circumstances weighed in determining whether a victim's reaction was reasonable.

126. *See supra* notes 73-78 and accompanying text.

127. *See State v. Orsello*, 554 N.W.2d 70, 78 (Minn. 1996) (Stringer, J., dissenting).

128. *See id.*; *see also State v. Lee*, 917 P.2d 159, 167 (Wash. Ct. App. 1996) (upholding that state's stalking statute against a vagueness challenge, the Court of Appeals said that "the statute's reliance on an objective test precludes the conclusion that it is unconstitutionally vague").

the state need not prove specific intent.<sup>129</sup> This concern is grounded in the legislature's listing terms and phrases used to establish intent as an element of crimes in Minnesota and the supreme court's reasoning in *Orsello*.

The Minnesota legislature set forth guidelines as to how specific intent is designated in a criminal statute.<sup>130</sup> One of the phrases establishing specific intent is "some form of the verb 'know.'"<sup>131</sup> Therefore, the amended statute is ambiguous, because it contains language used to establish specific intent as well as an express provision eliminating the need to prove specific intent.<sup>132</sup>

This is ironic considering the evolution of Minnesota's stalking statute as influenced by *Orsello*. In *Orsello*, the court proclaimed that a statute lacking a clear statement of the level of intent required must be resolved in favor of lenity toward a defendant and, in that case, to require specific intent.<sup>133</sup> Practically speaking, the statute's new requirement that a stalker know his or her conduct is harassing may place stalking law in Minnesota right back where it was after the *Orsello* decision. Although this concern may seem unfounded given the legislature's specific language declaring this crime a general intent crime, the legislature should feel compelled to remove any and all ambiguity from this statute given the interpretive gymnastics the *Orsello* court was willing to undergo to find ambiguity where there arguably was none.<sup>134</sup>

---

129. See MINN. STAT. § 609.749 subd. 1a. (Supp. 1997). In addition, requiring a stalker to know his or her conduct oppresses or intimidates another is underinclusive for failing to recognize that many stalkers do not know their activity does so. See *supra* notes 85-88 and accompanying text.

130. MINN. STAT. § 609.02 subd. 9 (1996). Minnesota's stalking statute states that "[w]hen criminal intent is an element of a crime in this chapter, such intent is indicated by the term 'intentionally', the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe'." *Id.* (emphasis added).

131. See *id.* In addition, several jurisdictions interpreting stalking statutes defining the crime with some form of the word "know" have imputed a specific intent element in the respective statutes. In *Rangel*, the Oregon Court of Appeals interpreted that state's statute, criminalizing "knowingly" alarming behavior, to require proof that the act and the alarm may be found in or implied from the statute, despite the fact that the court recognized that the statute, as written, did not require such proof. See *State v. Rangel*, 934 P.2d 1128, 1131-32 (Or. Ct. App. 1997); see also *Salt Lake City v. Lopez*, 935 P.2d 1259, 1264 (Utah Ct. App. 1997) (holding that the statute's requirement that a stalker "has knowledge or should have knowledge" of the impact of his or her actions creates a specific intent requirement).

132. See *supra* notes 35-36 and accompanying text.

133. See *supra* notes 30-31 and accompanying text.

134. See *supra* notes 30-31 and accompanying text.



## V. CONCLUSION

Stalking statutes have been enacted to address the recognition that stalking, by both strangers and acquaintances, is a problem in society for which the law provided insufficient remedies.<sup>135</sup> The overwhelming majority of these statutes have been upheld under constitutional attack.<sup>136</sup>

The Minnesota Legislature's amendment clarifying the intent requirement in Minnesota's stalking statute and establishing a general intent crime does not render the statute vague and is supported by strong policy considerations.<sup>137</sup> The legislature's narrow list of the acts constituting stalking satisfies the notice and enforcement provisions of the vagueness doctrine.<sup>138</sup> However, the legislature's removal of the reasonable person standard for interpreting a victim's reaction to stalking activity renders the statute unconstitutionally vague for pulling within its scope constitutionally protected behavior and for failing to specify any standard of conduct at all.<sup>139</sup> In addition, its requirement that a stalker "know" his or her conduct will intimidate their victim may, *de facto*, negate the provision eliminating specific intent as an element of this crime.<sup>140</sup>

The legislature should amend the stalking statute's definition of the crime by re-inserting the reasonable person standard and by eliminating the requirement that a stalker know his or her conduct will intimidate the victim. Doing so will eliminate the vagueness that makes the statute unconstitutional and will remove any ambiguity that may allow the Supreme Court to rule once again that this statute requires specific intent.<sup>141</sup> The resulting statute will: (1) protect victims from all types of stalkers, including delusional perpetrators or those who simply claim their activity is motivated by romantic inclinations; (2) remove constitutionally protected behavior from the statute's scope; (3) define the crime with sufficient clarity so that a person of ordinary intelligence could understand the conduct proscribed and to prevent arbitrary or discriminatory enforcement; and (4) remove any ambiguity that could render the statute, in effect, a specific intent statute.

*Brian L. McMahan*

135. See *supra* notes 14-22 and accompanying text.

136. See *supra* notes 23-24 and accompanying text.

137. See *supra* notes 58-72, 79-91 and accompanying text.

138. See *supra* notes 73-78 and accompanying text.

139. See *supra* notes 101-28 and accompanying text.

140. See *supra* notes 129-34 and accompanying text.

141. See *supra* note 101-34 and accompanying text.